No. 11-15956

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR CONSTITUTIONAL RIGHTS, et al.,
Plaintiff-Appellants,

v.

BARACK OBAMA, et al.,
Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR PLAINTIFF-APPELLANTS

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ABBREVIATIONS

"Plaintiffs" and "Defendants," where capitalized, refer to the respective sets of parties in this lawsuit.

"Dkt." precedes the docket numbers of documents in the Northern District of California, even where the document in question was first filed in the Southern District of New York.

"ER-" refers to the first volume of Excerpts of Record filed with this brief.

"SJ Br." refers to Plaintiffs' Memorandum in Support of Summary Judgment (Dkt. 16-3) (Mar. 8, 2006).

"MTD Opp." refers to Plaintiffs' Opposition to Defendants' Motion to Dismiss (Dkt. 16-5) (Jun. 30, 2006).

"Renewed SJ Br." refers to Plaintiffs' Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss ("Renewed SJ Br.") (Dkt. 47) (Jul. 29, 2010).

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. On January 31, 2011, the district court granted Defendants' motion for summary judgment and denied Plaintiffs' motion for summary judgment, ER-9-30, and entered a final judgment disposing of all claims on February 15, 2011, ER-7, appeal from which this Court has jurisdiction over pursuant to 28 U.S.C. § 1291. Plaintiffs timely filed their notice of appeal on April 14, 2011. ER-1.

STATEMENT OF ISSUES

Whether the district court erred in granting the government's motion for summary judgment on the grounds that Plaintiffs could only establish standing by showing that they had been actually subjected to surveillance under the NSA Program.

STATEMENT OF THE CASE

Plaintiffs in this action are the Center for Constitutional Rights (CCR) and several of its present and former legal staff members. On January 17, 2006, they filed a complaint in the Southern District of New York (Dkt. 16-1) alleging that the National Security Agency's (NSA's) operation of a program of warrantless electronic surveillance cast a chilling effect over their communications practices and thereby damaged their ability to engage in public interest litigation. In March 2006

Plaintiffs moved for summary judgment, based on factual admissions by government officials who spoke publicly about the nature of the NSA Program, seeking injunctive relief against continued operation of the program. In response the government cross-moved for dismissal or summary judgment based in part on an assertion of the state secrets privilege.

Judge Gerard Lynch of the Southern District heard oral argument on these motions on September 5, 2006, but never ruled on them. Instead, on the government's motion, the Judicial Panel on Multidistrict Litigation transferred the case to the Northern District of California, where it was coordinated with a large number of other actions primarily directed against telecommunications companies (*In re National Security Agency Telecommunications Records Litigation*, M:06-cv-1791). In January 2007 the government claimed it had terminated the NSA Program, and in light of this claim the parties submitted supplemental briefing on their pending dispositive motions, which were argued before Judge Vaughn Walker in the Northern District on August 9, 2007. However, several days before the oral argument, Congress passed the Protect America Act, which purported to authorize surveillance similar to that carried out under the NSA Program. Plaintiffs moved to amend their complaint to challenge the new statute on August 10, 2007, but Judge Walker did not rule on that motion until after the new statute had expired.

At the district court's request, the parties submitted a joint status report on March 19, 2010, in which Plaintiffs indicated their intent to renew their motion for summary judgment, seeking an order prohibiting the government from engaging in such warrantless surveillance in the future, and also seeking *in camera* disclosure and destruction of any records of NSA Program surveillance in the government's possession. Briefing on cross-motions to dismiss and for summary judgment was completed by October 2010; no oral argument was held. The district court held that that Plaintiffs could only establish standing by proving that they had been actually subjected to surveillance under the NSA Program, and granted the government's motion on January 31, 2011, dismissing the case.

STATEMENT OF FACTS

On December 15, 2005, the *New York Times* revealed that for more than four years the NSA, with the approval of the President, had engaged in a widespread program of warrantless electronic surveillance in violation of the Foreign Intelligence Surveillance Act (FISA), the post-Watergate statute subjecting electronic surveillance for national security purposes to a judicial warrant process (hereinafter the "NSA Program"). Rather than seeking to amend the statute, the President simply violated it by authorizing warrantless wiretapping of calls and emails where the NSA believed one party had some link to terrorism and was located outside the United States, without any oversight by the judiciary. Remarkably, instead of de-

nying the story or hiding behind assertions of secrecy, the President, Attorney General and other administration officials acknowledged many operational details of the Program in the course of carrying out a vigorous public defense of their actions.

Based on these public admissions about the nature of the NSA Program, Plaintiffs—the Center for Constitutional Rights and several of its legal staff members—initiated this suit. CCR is a national non-profit public interest law firm that has litigated several of the leading cases challenging post-9/11 detention, interrogation and rendition practices that violate statutory, constitutional and international human rights, including the Guantánamo litigation, the class action on behalf of "special interest" domestic immigration detainees, and the notorious rendition case of Canadian citizen Maher Arar. In the course of that litigation and related work, CCR lawyers and legal staff had communicated regularly by telephone and email with persons outside the United States who Defendants asserted were associated with al Qaeda or associated groups.

Plaintiffs perceived that these communications fit precisely within the category that had been, and would be, potentially subject to warrantless surveillance under the NSA Program. Their reasonable fears led Plaintiffs to avoid engaging in some communications, and to take costly countermeasures to protect others; in some circumstances, fears of such surveillance caused third parties refused to

communicate with Plaintiffs. Accordingly Plaintiffs sought declaratory and injunctive relief against the Program—specifically, an order that the administration cease the surveillance, disclose the nature of any past surveillance of Plaintiffs' communications, and destroy any such records remaining in the government's possession. Complaint (Dkt. 16-1) at 15-16.

FISA

In 1978, after the disclosure of widespread spying on American citizens by various federal law enforcement and intelligence agencies, including the NSA, and extensive investigations of these abuses by the Church Committee, Congress enacted the Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, Title I, 92 Stat. 1796 (Oct. 25, 1978), *codified at* 50 U.S.C. § 1801-62, as amended. FISA provides a comprehensive statutory scheme for conducting electronic surveillance for foreign intelligence or national security purposes. FISA requires (with narrow exceptions not applicable here[1]) that *all* such surveillance be conducted pursuant to orders from the statutorily-created Foreign Intelligence Surveillance Court (FISC). In enacting this statute, Congress provided that it and specified provisions of the criminal code governing wiretaps for criminal investigations were the "*ex-*

[1] For instance, FISA expressly authorizes warrantless foreign intelligence wiretapping only for the first fifteen days of a war; the legislative history making it clear that that period of time was chosen as being sufficient to allow the President to request and obtain additional surveillance powers from Congress if necessary. *See* 18 U.S.C. § 1811; SJ Brief (Dkt. 16-3) at 5.

clusive means by which electronic surveillance ... and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). Signing FISA into law, President Carter acknowledged that it applied to *all* electronic surveillance, stating: "The bill requires, for the first time, a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the United States in which communications of U.S. persons might be intercepted."[2]

In subjecting foreign intelligence electronic surveillance to strict statutory limits, FISA marked a substantial change in the law. Prior to FISA's enactment, Congress had chosen not to regulate foreign intelligence surveillance. In fact, when Congress regulated criminal wiretaps in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, it expressly recognized that it was leaving unregulated foreign intelligence surveillance: "Nothing contained in this chapter … shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States…."[3] When Congress enacted FISA, however, it repealed the above provision, and substituted the language quoted above providing

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[2] *Statement on Signing S.1566 Into Law,* 2 PUBLIC PAPERS 1853 (Oct. 25, 1978) (papers of James E. Carter) (emphasis in original)

[3] 18 U.S.C. § 2511(3) (1968).

that FISA and Title III were the "exclusive means" for engaging in electronic surveillance and that any such surveillance conducted outside the authority of those statutes was not only prohibited, but a crime. *See* 50 U.S.C. § 1809 (making it a felony to "engage[] in electronic surveillance under color of law except as authorized by statute" or "disclose[] or use[]" such information knowing it "was obtained through electronic surveillance not authorized by statute").

In practice FISA appeared to be extraordinarily permissive: there were only 5 rejections out of the first 22,987 applications made to the FISC from its inception thru 2006, belying any claims that the system was too restrictive to be practical.[4] Like Title III, the statute also provided authority for emergency executive authorizations (lasting 72 hours) when timely resort to the court was impractical.[5]

The NSA Program

In the fall of 2001, shortly after the terrorist attacks of September 11, the NSA launched a secret program to engage in warrantless electronic surveillance.[6]

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[4] A chart summarizing annual reports on FISA to Congress is available at http://epic.org/ privacy/wiretap/stats/fisa_stats.html.

[5] 50 U.S.C. § 1805(f) (2006) (current version at § 1805(e) (7 days)).

[6] President Bush, Radio Address (Dec. 17, 2005), transcript available at: http://www.whitehouse.gov/news/releases/2005/12/20051217.html; James Taranta, *The Weekend Interview with Dick Cheney*, Wall Street Journal, Jan. 28-29, 2006, at A8 ("interception of communications, one end of which is outside the United States, and one end of which is, either outside the United States or inside."); Michael Hayden, *Remarks at the National Press Club on NSA Domestic Surveillance* (Jan. 23, 2006) (hereinafter *Hayden Press Club*); Alberto Gonzales, *Press Briefing*

Administration officials admitted that the Program intercepted communications that were subject to the requirements of FISA. The Attorney General, for example, specifically admitted that the Program engaged in electronic surveillance governed by FISA.[7] Nonetheless, the Program was used "in lieu of" the procedures specified under FISA.[8] The NSA intercepted communications under the Program without obtaining a warrant or any other type of judicial authorization. Nor did the President or the Attorney General authorize specific interceptions. Instead, an NSA "shift supervisor" was authorized to approve the selection of targets or of communications to be intercepted whenever they determined there is "reasonable basis to conclude" that a party "is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."[9] In the words of General Michael Hayden, the Principal Deputy Director

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by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Dec. 19, 2005 (hereinafter *Gonzales/Hayden Press Briefing*) ("The President has authorized a program to engage in electronic surveillance").

[7] Alberto Gonzales, *Gonzales/Hayden Press Briefing* ("Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act provides—requires a court order before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday, unless … otherwise authorized by statute or by Congress.").

[8] Michael Hayden, *Gonzales/Hayden Press Briefing*; *see also Hayden Press Club*.

[9] Michael Hayden, *Gonzales/Hayden Press Briefing*; SJ Br. (Dkt. 16-3) at 7-8.

for National Intelligence, "this is a more ... 'aggressive' program than would be traditionally available under FISA."[10]

The Program primarily was directed at "one-end international" phone calls and emails between a person located outside of the United States and a person located within the United States where the government believed that one of the communicants fit the targeting criteria set forth above. Attorney General Gonzales refused to specify the number of Americans whose communications had been or were being intercepted under the Program.[11] However, as early as the very first media report on the Program, government officials were cited as admitting that thousands of individuals inside the U.S. and thousands outside the U.S. were targets.[12]

Despite the clear intent of Congress that the President seek an amendment to FISA to authorize extraordinary surveillance during wartime,[13] the President did not seek such an amendment, and instead acted unilaterally and in secret. President

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[10] Michael Hayden, *Gonzales/Hayden Press Briefing*; *see also Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006); *see also Hayden Press Club* ("trigger … quicker and a bit softer than … for a FISA warrant.")

[11] Alberto Gonzales, *Gonzales/Hayden Press Briefing*.

[12] *See* James Risen and Eric Lichtblau, *Bush Secretly Lifted Some Limits on Spying in U.S. After 9/11, Officials Say* (Dec. 15, 2005).

[13] *See supra* note 1.

Bush reauthorized the Program, again in secret, more than thirty times.[14] The administration considered asking Congress to amend FISA to permit the NSA spying program, but elected not to do so. Attorney General Gonzales acknowledged that administration officials consulted various members of Congress about seeking legislation to authorize the Program but ultimately chose not to do so because they were advised that it would be "difficult if not impossible" to obtain.[15]

Surveillance of attorneys

After the *Times*' December 2005 story was published, additional evidence emerged suggesting that the NSA Program, lacking any judicial supervision (or, *a fortiori*, judicially-supervised minimization standards[16]), was used to intrude on attorney-client communications. The complaint filed by the plaintiffs in a case currently pending in this Court claimed that a document inadvertently given to them by the government, while still labeled "TOP SECRET," contained summaries of phone calls between two American attorneys based in Washington, D.C. and offi-

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[14] *Press Conference of President Bush*, December 19, 2005, available at: http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html.

[15] Attorney General Gonzales stated, "We have had discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible." *Gonzales/Hayden Press Briefing*.

[16] Both FISA and Title III codify the constitutional requirement that judicially-supervised minimization standards be applied to minimize inadvertent interception of privileged communications. *See infra*, pp. 48-51.

cers of their client, a Saudi charity, demonstrating that attorney-client conversations had been intercepted and recorded. *See Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007). Although executive agencies have consistently refused to officially confirm (or deny) whether they have actually eavesdropped on lawyers, this Court's published opinions have adverted to the possibility. *See, e.g.*, *id.* at 1193.

The executive has acknowledged in a formal submission to Congress that, "[a]lthough the program does not specifically target the communications of attorneys or physicians, calls involving such persons would not be categorically excluded from interception." Assistant Attorney General William E. Moschella, Responses to Joint Questions from House Judiciary Committee Minority Members (Mar. 24, 2006) at 15, ¶45, *available at* http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf (last visited Jul. 24, 2010). According to *The New York Times*, "[t]he Justice Department does not deny that the government has monitored phone calls and e-mail exchanges between lawyers and their clients as part of its terrorism investigations in the United States and overseas," and the *Times* further reported that "[t]wo senior Justice Department officials" admitted that "they knew of ... a handful of terrorism cases ... in which the government might have monitored lawyer-client conversations. Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. Times, Apr. 28, 2008, at A14. Defendants conceded below that it would

be a "reasonable inference" to conclude from these statements of government officials "that some attorney-client communications may have been surveilled under" the Program. Defs. Reply Br. (Dkt. 49) at 4.

The initial dispositive motions

Within weeks of filing their complaint, Plaintiffs moved for partial summary judgment (Dkt. 16-3) based on the admissions about the Program summarized above: that the Program engaged in "electronic surveillance" otherwise subject to FISA's strictures, that it took place without obtaining the court orders required by FISA, and that it primarily targeted exactly the sorts of privileged phone calls and emails regularly engaged in by Plaintiffs in the course of their work with clients, family members of clients, witnesses, and co-counsel located overseas.

Plaintiffs asserted that the threat that their communications were being subjected to warrantless monitoring caused direct injury to their ability to fulfill their professional responsibilities as attorneys and to the exercise of their right to engage in public interest litigation. Because they could not assure the various litigation participants with whom they need to communicate that their conversations were confidential, Plaintiffs were forced to forego some international communications altogether and to pursue more costly and less efficient means (such as travel for in-person visits) for others. In addition, persons with whom Plaintiffs sought to communicate have been deterred from speaking to Plaintiffs as a result of the knowl-

edge that their communications may be monitored. The resulting injuries to Plaintiffs' professional work as public interest attorneys formed the basis for Plaintiffs' assertion of standing.

The government responded to Plaintiffs' summary judgment motion by filing a motion to dismiss (or, in the alternative, for summary judgment, Dkt. 12-1), seeking to dispose of Plaintiffs' claims on the grounds that they lacked standing or, alternatively, that further litigation was barred by the state secrets privilege. Both sides' dispositive motions were fully briefed by the end of August 2006, and Judge Gerard Lynch heard oral argument on these motions on September 5, 2006, but never ruled on them. Instead, the government moved before the Judicial Panel on Multidistrict Litigation to transfer the case to the Northern District of California, to be coordinated with a large number of other actions primarily directed against telecommunications companies, on the grounds that the classified information submitted *ex parte* with its motions to dismiss might be better protected from accidental disclosure if held by one district court, and based on the supposed dangers posed by different district courts issuing "inconsistent rulings" in these cases. The MDL Panel issued its transfer order on December 15, 2006.

In the meantime, a similar suit, filed in Detroit by the ACLU on the same day as this case was filed, resulted in a ruling that the Program was in violation of law, and granting a permanent injunction. *ACLU v. NSA*, 438 F. Supp. 2d. 754

(E.D. Mich. Aug. 17, 2006). That ruling was stayed pending expedited appeal to the Sixth Circuit.

Putative termination of the NSA Program

Notwithstanding earlier claims that it was not "possible to conduct this program under the old law,"[17] on January 17, 2007, two weeks[18] before scheduled oral argument in the Sixth Circuit in the ACLU case—the first challenge to the NSA program's legality to reach the Courts of Appeals[19]—the administration announced that a single FISC Judge had issued a number of orders

> authorizing the Government to target for collection international communications into or out of the United States where there is prob-

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[17] *See* http://www.whitehouse.gov/news/releases/2006/01/20060126.html.

[18] While the government sought to deflect the perception of manipulation to evade judicial review by claiming it sought to develop the new approach as far back as "the Spring of 2005—well before the first press account disclosing" the Program's existence (Gonzales Letter at ¶2)—it nowhere indicates precisely when application was made to the FISA court. (Of course, in 2004 the administration was aware that the *New York Times* knew of the Program and might someday disclose it. *See* Byron Calame, *Eavesdropping and the Election: An Answer on the Question of Timing*, *New York Times* (Aug. 13, 2006).) Although Defendants claim that the timing was coincidental, implying two years were consumed in the application and approval of the orders, they have never broken down how much of the two years was spent on musing over the form of the application and how long the application spent before the judge before it was approved, making it possible that the applications were submitted shortly before their approval.

[19] The case was in fact argued on January 31, 2007, despite the government's suggestion of mootness in light of its January 17th announcement. On July 6, 2007, the Sixth Circuit panel, in two separate majority opinions with one dissent, reversed the district court on standing grounds (and did not reach the issue of "intervening mootness"). *ACLU v. NSA*, 493 F.3d 644, 651 n.4 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008).

> able cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as a part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

Letter from Attorney General Alberto Gonzales to Senators Leahy and Specter, Jan. 17, 2007 ("Gonzales Letter"), available at http://graphics8.nytimes.com/ packages/pdf/politics/20060117gonzales_Letter.pdf, at ¶ 1. Accordingly, the "President has determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires" (whenever that might be). In essence, the government claimed the surveillance Program continued, but under unspecified forms of oversight and limiting regulations imposed by the Foreign Intelligence Surveillance Court. For instance, White House Press Secretary Tony Snow announced that "the program pretty much continues," but

> [t]he FISA Court has published the rules under which such activities may be conducted. ... the program continues, but it continues under the rules that have been laid out by the court.

Tony Snow, White House Press Briefing, Jan. 17, 2007 (available at http://www.whitehouse.gov/news/releases/2007/01/print/20070117-5.html). It remains a mystery how such an order—essentially a single warrant justifying an entire program of surveillance—fit within the particularity requirements of the FISA statute, which requires that applications and orders specify "the target" and "the facilities

or places at which the electronic surveillance is directed is being used" and identify minimization procedures. 50 U.S.C. §§ 1804, 1805.

Throughout the period that this order was in effect—and afterwards—the executive branch never renounced its claims that the original, non-judicially supervised NSA Program was lawful; far from it. Just after the January 17, 2007 announcement, Attorney General Gonzales testified before Congress that "[w]e believed, and believe today, that what the President is doing is lawful" and that his "belief is ... that the actions taken by this administration, by this President, were lawful in the past." Hearing before the Senate Judiciary Committee on Department of Justice Oversight (Jan. 18, 2007) (available on LEXIS) at 25, 29. Instead, the government asserted the right to carry out surveillance under the terms of the Program challenged by Plaintiffs *at any time*. *See* Gov't Reply Br. in Support of Supplemental Submissions, *ACLU v. NSA*, Nos. 06-2095, 06-2140 (6th Cir. Jan. 30, 2007) at 5 ("the president has not disavowed his authority to reauthorize the TSP in the event that the FISA court orders are not renewed.").[20]

[20] *See also* Press Briefing, Jan. 17, 2007 (Q: "...the President has always argued that—I mean, [that] he has the ability, he has the authority not to ... use FISA to get authority" ... White House Spokesman Snow: "Yes, and he still believes that."); *Hearing On The Foreign Intelligence Surveillance Modernization Act of 2007*, Senate Intelligence Committee (May 1, 2007) (Sen. Feingold: "Can each of you assure the American people ... that there is not and will not be any more surveillance in which the FISA process is side-stepped[?] DNI Michael McConnell: "Sir, the president's authority under Article II is—are in the Constitution. So if the

In short order, it appears, the Foreign Intelligence Surveillance Court reversed the decision of the judge who had initially allowed the January 2007 orders. Orders from the Court typically last only for a maximum of 90 days, after which the government must return to the court for renewal. However, those applications typically are rotated to different judges on the eleven-member court. The original orders were issued by a single judge on January 10, 2007. According to media reports, one or more other FISA judges rejected the "innovative" January 10th orders when they came up for renewal per the terms of the FISA statute. *See, e.g*., Greg Miller, *New Limits Put on Overseas Surveillance*, L.A. Times, Aug. 2, 2007, at A16 (reporting that second FISA judge rejected "basket warrants," allowing surveillance without particularized suspicion, that had been previously approved by first judge); *id*. (Apparently, "[o]ne FISA judge approved this, and then a second one didn't.").

Amendments to FISA

Provoked by an histrionic response to the Foreign Intelligence Surveillance Court's apparent refusal to renew the January 2007 orders,[21] Congress passed the Protect America Act in August 2007. The amendments provided that "surveillance

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president chose to exercise Article II authority, that would be the president's call.").

[21] *See* Ellen Nakashima & Joby Warrick, *House Approves Wiretap Measure*, Wash. Post (Aug. 5, 2007).

directed at a person reasonably believed to be located outside of the United States" is excluded from the definition of "electronic surveillance" that may be authorized exclusively by FISA. Instead, such surveillance could go forward under the PAA once the Director of National Intelligence and the Attorney General "determine" that the surveillance is "directed at a person reasonably believed to be outside the United States" (or otherwise does not constitute "electronic surveillance" under FISA), that "a significant purpose of the acquisition is to obtain foreign intelligence information," and establish what they "determine" to be "reasonable procedures" to ensure that such acquisition "concerns persons reasonably believed to be located outside the United States." 50 U.S.C. §§ 1805B(a), 1805A (2007). This "determination" is reduced to a written certification, supported by affidavit of "appropriate officials in the national security field," but is "not required to identify any specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed." 50 U.S.C. § 1805B(a),(b) (2007). The DNI and the AG need not find probable cause that the target of the surveillance is a "foreign agent" as defined in FISA or is involved in any criminal activities whatsoever. A copy of this certification is transmitted to the Foreign Intelligence Surveillance Court, where it remains pending any subsequent need to investigate the legality of the "determinations."[22]

[22] As noted in the Statement of the Case, *supra*, oral argument was held before

The Protect America Act was subject to a six-month sunset provision. Several months after it expired, Congress passed a new statute, the FISA Amendments Act of 2008 (FAA). That statute is the subject of a pending constitutional challenge, *Amnesty Int'l. v. Clapper*, 638 F.3d 118 (2d Cir. Mar. 21, 2011) (Lynch, J.), *petition for recon. en banc pending*,[23] brought by a number of plaintiffs similarly situated to Plaintiffs in the instant case. The Second Circuit, in the course of finding that the *Amnesty* plaintiffs had standing to challenge the new statute, described the new statute as follows: "The FAA, in contrast to the preexisting FISA scheme, does not require the government to submit an individualized application to the FISC identifying the particular targets or facilities to be monitored. Instead, the Attorney General ('AG') and Director of National Intelligence ('DNI') apply for a mass surveillance authorization…." 638 F.3d at 124. The DNI and AG submit to the FISC a written certification and supporting affidavits attesting generally that the "acquisition" targets persons "reasonably believed to be located outside the United States." The certification must include "minimization procedures" meeting the definition in FISA. *Id*. at 124.

Judge Walker on the parties' first round of cross-dispositive motions on August 9, 2007. That argument coincidentally fell just days after Congress passed the Protect America Act. Plaintiffs moved for leave to amend their complaint to challenge the new statute on the day after the oral argument, August 10, 2007, but Judge Walker did not rule on that motion until after the Protect America Act had expired. *See* Order, Dkt. 27 (Mar. 31, 2008) (denying motion).

[23] The *en banc* petition was filed over three months ago, on May 12, 2011.

The new administration's position on the legality of the original NSA Program

A number of cases involving the NSA Program have been litigated during the Obama administration, both in the district courts, this Circuit, and other Courts of Appeals. In none of the other cases has the current administration offered any defense of the legality of the Program. In fact, the Justice Department specifically declined to do so in a FOIA case involving some of the present Plaintiffs, *Wilner v. NSA*, 592 F.3d 60 (2d. Cir. 2009). At oral argument before the Second Circuit on October 9, 2009, the Government refused to make any argument in defense of the legality of the NSA Program, instead stating "[w]e take no position on the merits of the [legality of the] TSP." The new administration's briefs below also fail to take any position on the question.[24]

Renewed dispositive motions

On March 19, 2010, the parties submitted a joint status report to Judge Walker setting forth a proposal for further proceedings necessary to resolve the case; per that plan, over the next seven months the parties submitted and briefed cross-dispositive motions. In their 2006 summary judgment briefing Plaintiffs had primarily focused on their request that the court order Defendants to "cease conducting their program of warrantless surveillance." In their renewed motion they

[24] *See* Renewed Motion to Dismiss or for Summary Judgment, Dkt. 39; Reply, Dkt. 49.

sought both an order prohibiting the government from engaging in such warrantless surveillance in the future as well as *in camera* disclosure of any records of such surveillance of Plaintiffs in the government's possession, and sequestration of such records with an eye towards their eventual destruction. *See* Proposed Order, Dkt. 46 (filed July 29, 2010), ER-33.

The district court held that that Plaintiffs could only establish standing by proving that they had been actually subjected to surveillance under the NSA Program, and granted the government's motion on January 31, 2011, dismissing the case. ER-9-30.

SUMMARY OF ARGUMENT

The NSA Program cast a chill over Plaintiffs' past and present activities as public interest litigators. It forced Plaintiffs to change their international communications practices—preventing some communications entirely, delaying others, and sometimes requiring costly international travel to replace calls and emails. It also imposed costly burdens to investigate and take stock of potential past breaches of confidences. It has dissuaded third parties from communicating with and working with Plaintiffs. And the threat that the government has retained records from surveillance before it shut down the Program simply continues those harms in kind.

Neither *Laird v. Tatum* nor subsequent cases demand that Plaintiffs prove actual surveillance or some other exercise of coercive power were applied against

them. Plaintiffs changing their behavior in response to reasonable fears of surveillance have standing so long as they can point to concrete, objective harm resulting from those fears. The blatant—indeed, criminal—illegality of the Program, combined with the special vulnerability of attorneys' privileged communications, suffice to render Plaintiffs' fears (and the measures taken in response to those fears) reasonable, and the consequent injuries to their professional interests constitute concrete harm sufficient to underlie standing.

ARGUMENT

To satisfy the standing requirements of Article III, Plaintiffs must establish that (i) they have suffered a "concrete and particularized" threatened or present injury that is "actual or imminent" rather than "conjectural" or "hypothetical"; (ii) there is a causal connection between their injury and the challenged conduct, such that the injury is "fairly traceable" to the defendant's alleged violation; and (iii) it is "likely" that their injury would be at least partially redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This Court reviews the district court's grant of summary judgment de novo. *Univ. of Wash. Med. Ctr. v. Sebelius*, 634 F.3d 1029, 1033 (9th Cir. 2011).

It is well established that government action that has a deterrent or "chilling" effect on the free exercise of First Amendment rights, yet falls short of a direct prohibition against the exercise of such rights, may still create a constitutional vio-

lation, and thus potentially constitute injury-in-fact.[25] Where plaintiffs can "demonstrate 'a claim of specific present objective harm or a threat of specific future harm'" as a result of government action that chills expressive freedoms, they have shown sufficient injury to establish standing. *Meese v. Keene*, 481 U.S. 465, 472 (1987) (quoting *Laird v. Tatum*, 408 U.S. 1, 14 (1972)).

The district court, although it concluded that "plaintiffs appear to have established that their litigation activities have become more costly due to their concern about the [NSA Program]," nonetheless read the caselaw to mandate a specific rule that plaintiffs in cases alleging a chilling effect from electronic surveillance must be able to prove that they were actually subjected to surveillance in order to establish standing. *See* Order, Dkt. 51 (Jan. 31, 2011), at 19-20, ER-27-28.

Plaintiffs' chilling-effect injuries

Plaintiffs regularly engage in precisely the type of communications that were targeted by the NSA Program—international electronic[26] communications with persons who Defendants have asserted are associated with Al Qaeda, affiliated organizations, or terrorism generally. For example, Plaintiffs represent Maher Arar, a Canadian citizen stopped while changing planes at JFK airport and sent to Syria,

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[25] *See, e.g.*, *Virginia v. American Booksellers Assn'n*, 484 U.S. 383, 392-93 (1988); *Davis v. FEC*, 554 U.S. 724, 734-35 (2008).

[26] Plaintiffs often carry out such communications by telephone and email, as those are the most efficient ways to do so, and also out of necessity, as some of Plaintiffs' clients are barred from entering the United States.

where he was tortured and detained without charges for nearly a year, and then released. Although our government claimed he was a member of Al Qaeda, he is a free man in Canada, which cleared his name after an exhaustive government inquiry and awarded him a nearly CN$11 million settlement. Our government, in contrast, continues to keep Arar on a watch list, and prevented him from coming to the United States even for the purpose of testifying to Congress. In the government's view, then, Arar would fit squarely within the category of targets subject to NSA surveillance, as do numerous former Guantánamo detainees represented by Plaintiffs.[27] Plaintiffs also speak regularly with a variety of litigation participants—witnesses, potential clients, foreign co-counsel and others—who also fall within the broad criteria for persons subject to targeting under the Program. *Id*.

The risk that Plaintiffs' communications were subject to warrantless monitoring caused direct injury to their ability to fulfill their professional responsibilities to their clients and to the exercise of their own expressive rights. The threat of surveillance posed by the Program's existence required Plaintiffs to assume that their clients—and others with whom they communicate in connection with their legal work—were being made subject to electronic surveillance without any judicial oversight whatsoever. This makes it impossible to conduct sensitive privileged communications confidentially with those persons by telephone or email. Accord-

[27] *See* Affirmation of William Goodman (Dkt. 16-4), ER-48-50, ¶¶ 10, 6-7.

ingly, Plaintiffs were forced to seek out far less efficient[28] and more costly and cumbersome ways of communicating where confidences are critical, including traveling abroad.[29] The need to communicate by these less-efficient means often meant that communications had to be delayed, and these delays in turn added to delays in securing relief for clients. At times Plaintiffs have been forced to forego certain communications altogether. In addition, the behavior of third parties has been affected to Plaintiffs' detriment: specific individuals with whom they sought to communicate have been deterred from speaking to Plaintiffs as a result of the knowledge that their communications may be monitored.[30] Plaintiffs have also been forced to review and analyze all past international communications in order to evaluate whether confidences may have been breached by Defendants' illegal surveillance and whether measures ought to be taken in response.[31]

Far from a mere "subjective chill," these measures were obligatory as a matter of professional responsibility, as the uncontested opinion of Plaintiffs' legal

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[28] "Less efficient" here means more than just "more costly for the same result." The natural give-and-take process involved in any good interview of a client or witness is lost when, for example, a series of sealed letters sent by courier are used to have a conversation in lieu of a live conversation by electronic means. *See* Supplemental Aff. of William Goodman (Dkt. 16-7) (Jun. 30, 2006) (correspondence "does not permit either the ready back-and-forth counseling inherent in any attorney-client relationship or the sort of probing inquiry essential to any investigative enterprise.").

[29] *See* Goodman Aff (Dkt. 16-4), ER-53, ¶ 15.

[30] *See, e.g.*, Meeropol Aff. (Dkt. 16-8), ER-45 ¶ 17.

[31] *See* Goodman Aff. (Dkt. 16-4), ER-54, at ¶ 16.

ethics expert confirmed. *See* Affirmation of Stephen Gillers (Dkt. 16-6), ER-38, ¶ 9 ("The decision [to avoid using electronic means of communications for client secrets or confidences in light of the existence of the NSA Program] is not discretionary. It is obligatory."). The reactions of third parties are also independent of Plaintiffs' voluntary choices.

Harm from retention of records

Even assuming the NSA Program challenged in plaintiffs' original summary judgment papers were no longer in active operation with respect to continuing interception of communications, *and* there were no risk of the executive reviving the Program,[32] Plaintiffs continue to be harmed by the risk that the government has retained records from surveillance under the Program. For this reason, Plaintiffs' renewed summary judgment briefing emphasized their request (also made in their original summary judgment motion) for an order that the government destroy all data, derivative materials, and fruits thereof relating to surveillance of plaintiffs. Plaintiffs also sought limited *in camera* disclosure of the specific nature of any such surveillance.

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[32] As we note below, Plaintiffs' request for relief against ongoing interception is not moot simply because the government has claimed it ceased to operate the program, given that it continues to claim the right to resume the Program at any time. *See infra* pp. 54-55.

Even prior to the alleged termination of the Program, the "added expense and effort" created by the threat of surveillance under the Program was not just that of changing communications patterns, but also the burden imposed by the need to take stock of the scope of the potential breach of confidentiality—for instance, Plaintiffs were compelled by their professional responsibilities "to review and analyze all past international communications (back through late 2001 when the Program began) that may have involved sensitive matters in order to evaluate whether confidences may have been breached by Defendants' illegal surveillance and whether measures ought to be taken in response."[33] CCR staffers must still be vigilant to the risk that the confidentiality of *past* privileged communications relevant to *current-day litigation decisions* was breached,[34] and conform their current communications and litigation practices accordingly. Until the air is cleared by assurances that the government does not possess records of their confidential communications seized unlawfully under the Program, that injury will continue.[35]

In many respects, there is little to distinguish the threat of injury posed by ongoing surveillance of Plaintiffs' communications from the threat posed by past

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[33] MTD Opp. (Dkt. 16-5), at 5.

[34] Again, under FISA or any other *constitutional* statutory surveillance scheme, such communications would ordinarily have been subject to judicially-supervised minimization requirements protecting privileged communications. *See infra* note 59.

[35] As a result, various attorneys felt "compelled by their professional responsibilities to move for disclosure" relating to surveillance, either thru FOIA or resort to the judges in their cases. MTD Opp. (Dkt. 16-5), at 4.

surveillance of conversations with individuals they still work with, where the government has retained records of the content of those communications. In light of the fact that records of such prior communications may be available to the government, responsible attorneys would still maintain caution in continuing those lines of conversation with potential litigation participants (witnesses, potential class members, overseas counsel, etc.). Those third parties might sensibly be hesitant to communicate freely with CCR staffers even absent a risk of current unlawful interception. Moreover, there is a tremendous threat posed by the fact that the government may have access to aspects of CCR's litigation strategy. That risk must be accounted for in any consideration of the future path any potentially-affected case may take, including settlement. Ultimately, this can only hinder the ability of CCR to litigate such cases.

The risk that the government has retained records of prior NSA Program surveillance of CCR's communications creates a current risk that third parties who communicated with CCR previously will now be less willing to do so, knowing that the government may have been listening in on those earlier calls. Plaintiffs cited one such example specifically, describing the reluctance of a potential class member to continue communicating electronically with a CCR staff attorney (*see* Meeropol Aff. (Dkt. 16-8), ER-45, ¶17). The class action in question remains active, and it would be perfectly reasonable for that particular individual, or others

who were warned about the possibility of surveillance when they communicated with CCR while the Program was active, *id*. ER-44-45, ¶16, to remain wary of communicating with CCR (electronically or otherwise), or participating in litigation, given that the confidentiality of past communications cannot be assured.

Lawyers routinely take great care to maintain secrecy in identifying and investigating potential clients and defense witnesses. The government's continued retention of NSA Program intercepts has the effect of informing every such otherwise-confidential source of information who Plaintiffs spoke to while the Program was active that the United States government may be aware of their identity and the substance of their communications with CCR. Add the complicating factor that such potential clients, relatives of clients, fact and expert witnesses, and foreign counsel are located overseas—at times in countries with close intelligence relationships with the United States and lesser respect for human rights norms than we profess. Uncertainty about the confidentiality of past communications with CCR can be expected to have a foreseeable (and perfectly reasonable) effect on the behavior of such third parties that in turn causes concrete harm to CCR's ability to engage in litigation against the government.[36]

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[36] Third parties could reasonably fear a wide variety of consequences as a result of government possession of the contents of past communications with CCR staff: they would be subject to the ongoing risk that NSA will share such information with foreign government officials in the future, even if it does not disclose criminal activity (*e.g*. that a potential client was engaged in pro-democratic politi-

The converse is also true: any responsible attorney would have to conform their behavior to account for the possibility that potential clients and witnesses might be tainted by the possibility of past government interception and retention of their communications with CCR. If the government has access to intercepted work-product communications with persons who Plaintiffs communicated with while the Program was active, CCR will have to exercise caution going forward working with such individuals in litigation, whether by putting them on the stand, broaching certain subjects during testimony, or even using them (as clients or witnesses) in litigation at all. In short, the threat that records are retained from the NSA's non-judicially-minimized interceptions means CCR must take steps to ensure the government does not gain a litigation advantage from access to aspects of our litigation strategy, and that need for caution interferes with our ability to construct a case under the ordinary assumptions of confidentiality that underpin our adversary system of justice.

It is, of course, difficult to identify such vulnerabilities without knowing precisely what the government may know as a result of its unlawful surveillance.

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cal organizing in opposition to a dictatorial foreign government), and may fear that that information is more likely to be shared if they stay in touch with CCR. They may also fear the use of such privileged conversations in seeking authority for otherwise-lawful warrant orders—with good reason given that this was reported to have happened, *see* Carol D. Leonnig, *Secret Court's Judges Were Warned About NSA Spy Data*, WASH. POST (Feb. 9, 2006) (reporting reaction of Chief FISC Judge Kollar-Kotelly to revelations of use of NSA Program surveillance in FISA applications).

But seeking such knowledge is the point of this lawsuit. Clearly some duty to investigate breaches of confidentiality is an ethical obligation, as much as the duty to warn clients of the possibility of surveillance. *See, e.g.*, Goodman Aff., ER-54, ¶ 16 (describing professional imperative upon plaintiffs in this case to evaluate whether confidences may have been breached by Defendants' illegal surveillance and whether measures ought to be taken in response); Meeropol Aff., ER-43-44, ¶ 13 (same); Gillers Aff., ER-38, at ¶10 ("Intercepted communications may be exploited to the disadvantage of clients with no one the wiser. … [W]hether intercepted communications are or are not ever used to the disadvantage of a client or otherwise is irrelevant. CCR has a duty to protect its clients' secrets and confidences regardless of the use to which an interceptor may put the information. It is disclosure itself that is the evil against which lawyers must protect clients, regardless of any additional consequences of the disclosure"). Plaintiffs are under a professional imperative to ensure that the government does not gain a litigation advantage from having access to confidential information about potential witnesses and litigation strategy. The requirement that Plaintiffs take affirmative steps to mitigate the risk of harm (including bringing this case) is itself sufficient injury for standing purposes.

In short, it requires little imagination to see the continued threat of harm posed by the profoundly intrusive surveillance the NSA carried out with abandon

for at least five years to the attorneys and legal staff who are Plaintiffs in this matter. There is no logical basis for the idea that Plaintiffs' need for termination of surveillance was somehow greater during the Program's pendency than their need for disclosure and destruction of records today.

Defendants did not contest the legitimacy of the harms linked to retention of records described in Plaintiffs' briefing on standing below. *See* Renewed SJ Br., Dkt. 47, at 4-8 (describing harms flowing from retention of past surveillance, and concluding plaintiffs' "disclosure and disgorgement claims … are essentially equivalent for standing purposes to plaintiffs' ongoing interception claims"). Instead, the government confined its dispute with Plaintiffs to the question of whether they were in fact subject to surveillance. While the district court agreed that that question was dispositive, in dismissing Plaintiffs' claims the court noted that "Plaintiffs appear to have established that their litigation activities have become more costly due to their concern about the [NSA Program]." ER-27.

Chilling effect injury-in-fact: Legal standards

Federal courts have consistently recognized injuries of this sort as a sufficient basis for standing. In *Meese v. Keene*, 481 U.S. 465 (1987), for example, the Supreme Court granted standing to Barry Keene, a California State Senator who was deterred from showing foreign films by a Foreign Agents Registration Act

provision that characterized the films as "political propaganda."[37] The Court held that Keene had standing because he had demonstrated not only a "subjective chill," but also had presented evidence of "specific present objective harm or a threat of specific future harm" by showing that the government's actions "caused or ... threate[ned] to cause a direct injury" that was "distinct and palpable," *id*. at 472:

> We find … that appellee has alleged and demonstrated more than a "subjective chill"; he establishes that the term "political propaganda" threatens to cause him cognizable injury. He stated that "if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." 569 F.Supp., at 1515.

481 U.S. at 473. The Court found that Keene had shown that he "could not exhibit the films without incurring a risk of injury to his reputation and of an impairment of his political career." *Id*. at 475. While Keene could have minimized the damage to his reputation with appropriate disclaimers, "the need to take such affirmative steps to avoid the risk of harm" was itself cognizable injury. *Id*. at 475. Similarly, Plaintiffs here have already taken affirmative steps, and will have to continue to do so in the future, to counteract and minimize the damage to their professional interests caused by the Program.

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[37] *Cf. infra* p.43, noting that agency claimed *labeling* of the films as propaganda was not mandatory; the district court expressed astonishment at that reading, but nonetheless found that the statutory characterization stigmatized the films, *see Keene v. Smith*, 569 F. Supp. 1513, 1519, 1519 n.2 (E.D. Cal. 1983).

Keene thus stands in contrast to *Laird v. Tatum*, 408 U.S. 1 (1972), upon which Defendants principally have relied. In *Laird*, army intelligence agents infiltrated public political meetings and protests involving the plaintiffs, and kept data on what they observed. The case was dismissed on standing grounds. The *Laird* plaintiffs failed to show that "any cognizable interest" of theirs was harmed because they claimed only that "defendants might, in the future, make unlawful use of the data gathered." *Keene*, 481 U.S. at 472. The method of surveillance used—infiltration of public gatherings—was not itself illegal; indeed it was "nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." *Laird*, 408 U.S. at 9 (quoting Court of Appeals).

Laird stands for nothing more than the point that "allegations of a subjective chill" do not by themselves suffice to convey standing if they are based on only speculation that the government "might in the future" make some unlawful, harmful use of the information being lawfully gathered.[38] *Id.* at 13-14; 11. Because the *Laird* plaintiffs claimed that the "exercise of [their] First Amendment rights is being chilled by the mere existence, *without more*, of a governmental investigation and data-gathering activity that is alleged to be broader in scope than is reasonably

[38] In addition to the gathering of the information being lawful, it goes without saying that none of the information collected and retained in *Laird* was protected by some legal privilege—unlike the attorney-client and work-product privileged communications at issue in the instant case.

necessary for the accomplishment of a valid governmental purpose," *id.* at 10 (emphasis added), they failed to meet this test. Indeed, the plaintiffs arguably conceded that they were not themselves chilled. *Id*. at 14 n.7 (plaintiffs "cast considerable doubt" on whether they were in fact chilled).[39] It turned, in short, on plaintiffs' failure to show *any* injury. Plaintiffs here, by contrast, do not complain merely of some potential future misuse of surveillance information, but assert that they are currently suffering from ongoing injuries to their ability to engage in public interest litigation.

Lower courts have consistently found standing to exist where plaintiffs can show that a reasonable subjective fear caused by surveillance is accompanied by economic and professional harm, including the diversion of time and effort and the negative reactions of third parties and experienced by Plaintiffs here. In a case before this Court, *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), the INS had, without probable cause, sent agents wearing bugs to infiltrate churches associated with the Sanctuary movement. The existence of the surveillance program was revealed to the public by subsequent criminal trials. As a

[39] *See also Tatum v. Laird*, 444 F.2d 947, 959 (D.C. Cir. 1971) (MacKinnon, J., concurring in part). Although *Laird* is popularly associated with the adage that "allegations of a subjective chill are not an adequate" injury to convey standing without more, "this language may plausibly be regarded as dictum" given that there may not have been a chill of any sort—objective or subjective—in that case. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 413 (3d Ed. 1999).

consequence of parishioners' fears of *future* surveillance provoked by these disclosures about *past* surveillance, "the churches have alleged actual injuries":

> For example, they allege that as a result of the surveillance of worship services, members have withdrawn from active participation in the churches, a bible study group has been canceled for lack of participation, clergy time has been diverted from regular pastoral duties, support for the churches has declined, and congregants have become reluctant to seek pastoral counseling and are less open in prayers and confessions.
>
> ... In our view, the churches have suffered harm analogous to the "reputational" or "professional" harm that was present in [*Meese v.*] *Keene*.... [and] this [type of] injury to the churches can "fairly be traced" to the INS' conduct.

Id. at 521-23. Plaintiffs here have suffered similarly objective harms. They have suffered from the chill cast over third parties whose participation in litigation is essential to Plaintiffs' work. They have been forced—as a matter of professional ethics[40]—to divert time from other duties to implement communications safeguards and review past communications for possible breaches of confidentiality. And finally, just as the Presbyterian parishioners could reasonably fear "becoming part of official records," 870 F.2d at 523, Plaintiffs have been forced to account for the possible retention of records from NSA Program surveillance. This "'professional' harm" is sufficient to support standing. *Presbyterian Church*, 870 F.2d at 522; *see also Riggs v. City of Albuquerque*, 916 F.2d 582, 584 (10th Cir. 1990)

[40] *See* Gillers Aff., ER-38, ¶ 9 ("The decision [to avoid using electronic means of communications for client secrets or confidences] is not discretionary. It is obligatory.").

("the effect of [the surveillance here] goes beyond subjective fear to include injury to [plaintiffs'] personal, political, and professional reputations.").

In a case decided by the Second Circuit several weeks after Judge Walker dismissed the instant case, *Amnesty Int'l v. Clapper*, 638 F.3d 118 (2d Cir. Mar. 21, 2011), the court found a similarly-situated group of plaintiffs had standing to challenge the 2008 amendments to the FISA statute (the FAA). Plaintiffs in *Amnesty* were a group of journalists and attorneys (many of whom were involved in terrorism cases) who "regularly communicate by telephone and email with precisely the sorts of individuals that the government will most likely seek to monitor" under the new statute. *Id*. at 138. Like Plaintiffs here, because of their "fear that the government will intercept their sensitive international communications," the *Amnesty* plaintiffs had "already incurred professional and economic" injury as a result of their "costly and burdensome" countermeasures in response to the risk of surveillance under the FAA. *Id*. at 133. The court agreed with the plaintiffs that their perception that they were at risk of surveillance under the FAA "was reasonable." *Id*. at 139. (Like Plaintiffs here, "the government ha[d] not disputed that assertion." *Id*.) Moreover, given the sensitivity of plaintiffs' communications, *id*. at 127 n.11, the "severity of the probable harm" from any breach of confidentiality contributed to the court's determination that plaintiffs' fears, and the countermeasures they chose in response to those fears, were reasonable. *Id*. at 138. Despite the fact that

the surveillance at issue was notionally legal (in the sense of being authorized by statute) and required some judicial involvement and a minimization process, *id*. at 138, 138 n.21, the court found that the plaintiffs had standing to challenge it.

Reasonable fears of concrete, objective harm are sufficient

Much confusion has been wrought by *Laird*'s cautionary language that "*subjective* chill, without more" should not be the basis for standing. *Laird* and subsequent chilling effect cases show a concern about the "objectivity" of two elements of the standing analysis: first, that the fear causing plaintiffs to act or be deterred from acting should be *objectively reasonable*;[41] and second, that the harm asserted be something tangible—what is referred to as "concrete harm" in the many post-*Laird* Supreme Court pronouncements on standing—and therefore *objective* in that sense. Where either the fear or the harm are overly subjective (as in *Laird*, where plaintiffs had no more than half-hearted assertions regarding psychological anxieties provoked by the army's lawful monitoring), standing will not be found. But where plaintiffs can produce evidence of the objective reasonableness of their fears resulting from government action,[42] and can also point to consequent objective

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[41] *See, e.g*., *Amnesty*, 638 F.3d at 150 ("we deem that fear and those actions to be reasonable"); *id*. at 133-34 (fears not "remote or fanciful," "paranoid or otherwise unreasonable" can support standing).

[42] The uncontested expert opinion of Professor Gillers that certain responsive measures are obligatory for attorneys as a matter of professional responsibility, ER-38, ¶9, surely places the objectivity of Plaintiffs' concerns beyond doubt.

harm (such as the "professional" harm asserted here, and relied on by the Supreme Court in *Keene* and this Court in *United Presbyterian Church*), they have established a sufficient basis for standing.

Laird's "subjective chill, without more" language does not mean that standing is absent in every case where plaintiffs' fear of government conduct motivates them to elect to take actions that proximately cause their own injuries. Instead (to restate the standard in positive terms), courts have demanded that plaintiffs in chilling effect cases must have a reasonable (*i.e*. non-subjective) fear of concrete, objective harm (*i.e.* something going beyond mere subjective anxiety). So, for example, the social studies teacher in *Paton v. LaPrade*, 524 F.2d 862, 873-74 (3d Cir. 1975), fails the second prong, because he could assert no specific tangible harm beyond the anxiety the challenged mail cover program (directed at one of his students because of a class project) caused him in the course of his teaching. And the *Laird* plaintiffs failed the first prong: they lacked reasonable cause to be afraid.[43]

Courts have regularly given great weight to the illegality of government conduct in holding that chilling-effect plaintiffs' fears were reasonable in light of

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[43] As noted above, they may well have failed the second prong (concrete, objective harm) as well. *See* note 39, *supra*; *Laird*, 408 U.S. at 14 n.7 (plaintiffs "have also cast considerable doubt on whether they themselves are in fact suffering [any injury]… At the oral argument before the District Court, counsel for respondents admitted that his clients were 'not people, obviously, who are cowed and chilled'; indeed, they were quite willing 'to open themselves up to public investigation and public scrutiny.' But, counsel argued, these respondents must 'represent millions of Americans not nearly as forward [and] courageous' as themselves.").

Laird (which challenged the use of information obtained through concededly lawful surveillance).[44] It bears repeating, five years after the initial shock of the revelation of the NSA Program's existence, that this case deals with clearly *criminal* surveillance. (Indeed, the government appears to have abandoned any defense of the legality of the Program.[45]) It is one thing to claim that one is chilled by the speculative possibility that the government might misuse information lawfully obtained; it is another matter entirely to claim that one is deterred by the threat of being subjected to surveillance that is both ultra vires and criminal. The particular vulnerability of attorneys to harm from this sort of lawless intrusion reinforces the concreteness of the injury here.[46]

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[44] *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 147, 150-51 (D.D.C. 1976) ("retention of information, if collected in a legal manner, cannot be challenged, ... *illegal* electronic surveillance ... [is] subject to challenge"; "numerous acts of warrantless electronic surveillance" held justiciable) (emphasis added); *see also Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979) ("allegations of a system of independently unlawful intrusions" establishes injury, causation and standing), *vacated on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982); *Riggs*, 916 F.2d at 586; *Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975).

[45] *Cf.* Renewed SJ Br. (Dkt. 47) at 25-28 (responding to earlier arguments in defense of legality of Program); *supra* pp. 20 (describing new administration's refusal to opine on legality of Program).

[46] The fact that Plaintiffs are attorneys—and a very specific, small subset of attorneys, deeply involved with a variety of post-9/11 cases, at that—also ensures that their claims cannot plausibly be viewed as a "generalized grievance." *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Amnesty*, 638 F.3d at 144 (plaintiffs "not merely random citizens").

The government nonetheless claimed below that in order to assert injury-in-fact a chilling effect plaintiff must satisfy one of two mechanical rules: they must show that they were chilled by either by actual surveillance, or by some other actual application of coercive governmental power.[47] Neither is supported by the caselaw.

Laird does not mandate that every chilling effect result from a coercive ("regulatory, proscriptive, or compulsory") exercise of government power

In summarizing a number of its previous "chilling effect" opinions, the Supreme Court in *Laird* also stated that in each of them, the "challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature." *Id*. That part of the opinion merely surveyed and distinguished previous Supreme Court cases where standing was upheld. It did not announce a new standard for future cases.[48] Subsequent cases—including one in this circuit—have flatly re-

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47 *See, e.g.*, Defs. Reply Br. (Dkt. 49) at 1.

48 Justice Marshall, sitting alone as Circuit Justice to review a denial of a stay, similarly stated that this was too broad a reading of *Laird*, rejecting precisely the argument Defendants make here. *See Socialist Workers Pty. v. Attorney General*, 419 U.S. 1314, 1318-19 (1974) (Marshall, Circuit J.):

> The Government has contended that under *Laird*, a 'chilling effect' will not give rise to a justiciable controversy unless the challenged exercise of governmental power is 'regulatory, proscriptive, or compulsory in nature,' and the complainant is either presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging. *Id*. In my view, the Government reads *Laird* too broadly. In the passage relied upon by the Government, the Court was

jected the notion that only "regulatory, proscriptive, or compulsory" uses of government power may convey standing. *See Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (rejecting argument that government intrusion must reach the level of "'coercive action'" before standing may be found in chill cases); *see also Amnesty Int'l v. Clapper*, 638 F.3d 118, 147, 149 (2d Cir. 2011) (same); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1096 (10th Cir. 2006) (en banc) (McConnell, J.) ("plaintiffs can assert standing based on a chilling effect on speech even where the plaintiff is not subject to criminal prosecution, civil liability, regulatory requirements, or other 'direct effect[s],'"); *id.* at 1095 ("To be sure, 'chilling effect' cases most often involve speech deterred by the threat of criminal or civil liability. Yet neither this Court nor the Supreme Court has held that plaintiffs always lack standing when the challenged statute allegedly chills speech in some other way.").

The Supreme Court effectively rejected such a standard in *Keene*, 481 U.S. at 473 ("governmental action need not have a direct effect on the exercise of First Amendment rights, we held [in *Laird*], [but] it must have caused or must threaten

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> merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not. … In this case, the allegations are much more specific: [dissuading participation in a convention and stigmatizing those who do attend]. Whether the claimed 'chill' is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question. The specificity of the injury claimed by the applicants is sufficient, under *Laird*, to satisfy the requirements of Art. III.

to cause a direct injury to the plaintiffs"). The government has claimed even *Keene* fits into its proposed rule, with the coercive (proscriptive/regulatory) action being the fact that Keene would have been compelled to label the films he wanted to show as "propaganda." However, as the Second Circuit noted in *Amnesty*, "The district court in that case made clear that '[a]ccording to the authoritative agency interpretation of the Act and the regulations, plaintiff [wa]s free to remove the ['political propaganda'] label before exhibiting the films.' *Keene v. Smith*, 569 F. Supp. 1513, 1516 (E.D. Cal. 1983); *see also id*. at 1519 ('[P]laintiff has no obligation with respect to the label, and ... is free to remove the label if he chooses.'). Hence, as in the instant case, the *Meese* statute did not directly regulate the plaintiff or require him to do, or refrain from doing, anything at all."[49]

Standing in surveillance chilling-effect cases does not depend on proof plaintiffs were actually surveilled

The district court relied on the absence of proof of actual surveillance in dismissing Plaintiffs' claims: "Plaintiffs have not provided any precedent for the notion that the First Amendment protects against a 'risk * * * that the government may have access to aspects of [a plaintiff's] litigation strategy' where there is no proof that any surveillance in fact occurred." ER-27; *see also* ER-29. Of course,

[49] *Cf. United States v. SCRAP*, 412 U.S. 669, 686-89 (1973) (plaintiffs had standing despite not being regulated *directly* by ICC); *Massachusetts v. EPA*, 549 U.S. 497, 521-26 (2007) (cognizing similarly indirect injury).

nothing in the chilling-effect standing precedents discussed above requires such a special *per se* rule for surveillance cases. However, there is precedent for finding standing based on the chill cast by the mere threat of surveillance. Two months after the district court opinion dismissing this case, the Second Circuit decided *Amnesty v. Clapper*, 638 F.3d 118 (2d Cir. March 21, 2011), validating just such an assertion of standing. Moreover, in *Riggs v. Albuquerque,* 916 F.2d 582 (10th Cir. 1990), cited by plaintiffs below,[50] the Tenth Circuit reversed a dismissal on standing grounds in a case where a number of plaintiffs (including attorneys) brought suit without all knowing whether or not they were targets of the surveillance in question.

Defendants have relied on two D.C. Circuit cases in support of the district court's mechanical standard: *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) (*UPC*) and *Halkin v. Helms* (*Halkin II*), 690 F.2d 977 (D.C. Cir. 1982). *UPC* was a challenge to a 1981 executive order that set forth procedures for the division of labor between the FBI and other foreign intelligence agencies in carrying out surveillance. The order is reproduced in Judge Scalia's opinion; although it makes no mention of the authority for such surveillance, it seems on its face that most of it related to operational procedures for agencies seeking FISA warrants. Nowhere does the order set forth any warrantless wiretapping pro-

[50] Renewed SJ Br. (Dkt. 47) at 20 n.39; MTD Opp. (Dkt. 16-5) at 8-9.

cedures, and in fact it was ostensibly designed to *eliminate* illegal surveillance (in the wake of the Church Committee investigations (*see, e.g.*, 738 F.2d at 1382 n.3). While plaintiffs claimed they experienced chilling effects from the fact that the order might govern the process for making them targets under FISA, they made absolutely no claim against FISA itself. The only allegations of illegality they made related to government actions *prior* to the order that their claims were directed at, as the District Court opinion makes clear.[51] Nor were the *UPC* plaintiffs a group especially vulnerable to warrantless surveillance because of the risk of legally-recognized communications privileges being violated, as in the instant case.[52] Plaintiffs' failure there was not that they did not show they were *actual targets* of an illegal program. Rather, they failed to make *any plausible claim of illegality*, no

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[51] *See United Presbyterian Church v. Reagan*, 557 F. Supp. 61, 63 (D.D.C. 1982) ("Plaintiffs in this case have failed to allege any such redressable concrete injury attributable to Executive Order 12333. They allege 'fear' and 'concern' that they 'may be targeted' for intelligence-gathering activities, but introduce no evidence to support their claim—beyond allegations that some of the plaintiffs had been subject to possibly illegal surveillance for past activities, in the past before the Order was promulgated. Nor do they make any allegations to support the assumption that any intelligence-gathering activities that may take place pursuant to the Order in the future will be illegal. Plaintiff has conceded at oral argument that much of the activity authorized by the Order is well within the strictures of the Constitution and laws of the United States.")

[52] The UPC plaintiff group were political and religious activists, journalists, and academics. The original complaint in the National Archives does not indicate that there were any attorneys in the group; although apparently one individual plaintiff (Severina Rivera) was in fact an attorney, the complaint makes absolutely no mention of that fact. *See* Complaint, *UPC v. Reagan*, Civil Action No. 82-1824 (D.D.C. Jun. 30, 1982), at ¶¶ 60-61.

less any other showing of being affected by the practices at issue. Like the *Laird* plaintiffs, the *UPC* plaintiffs were worried about how a lawful system might be put to unlawful uses against them in the future.

Halkin II, the final chapter in litigation that had been drawn out for years, similarly lacked allegations of illegality or special vulnerability to harm. By the time of the *Halkin II* opinion, the only claims that remained were that plaintiffs' international communications might be intercepted under some not-yet-extant successor to the NSA's MINARET program[53] because their names might be put on watchlists and passed on to NSA by other agencies. The only prospective claims (for equitable relief) in *Halkin II* related to such future submission of watchlists to the NSA. *Id*. at 997. The D.C. Circuit held that mere forwarding of watchlists from one agency to another could not be a Fourth Amendment violation, and that plaintiffs could not prove that anything *illegal* happened after the forwarding. *Id*. at 997-98. In *Halkin II* there was also no claim that the plaintiffs were *especially vulnerable* to harm from the existence of a surveillance program in the same way that Plaintiffs here are (*e.g*., the difficulty of *functioning as attorneys* because of the complained-of watchlisting). *See id*. at 998 n.78 (plaintiffs "cannot demonstrate any injury—past, present, or future" from watchlisting).

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[53] Under project MINARET, NSA intercepted electronic communications of U.S. citizens whose names were on watchlists and passed those intercepts on to the FBI, DOD, *etc*.

Seen as chilling effect cases, *Halkin* and *United Presbyterian Church* fail both halves of the *Laird* test, first because plaintiffs made no allegations of gross illegality that would have rendered it objectively reasonable to fear the government actions at issue,[54] and second because plaintiffs failed to allege that they experienced tangible, objective harm or that they were especially vulnerable to harm (*e.g.* that their communications were subject to legal privilege). The two cases do not establish a blanket rule that persons chilled by a surveillance program must assert that they were targets of the surveillance in order to maintain standing, even in the D.C. Circuit, and there is certainly no such rule in the Ninth Circuit.[55]

Causality and redressability: Legal standards

Because the district court's inquiry ended at injury-in-fact, ER-25, it never reached the intertwined requirements of causality and redressability. Defendants argued below that even if Plaintiffs have suffered injury in fact, that injury is not

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[54] Again, a threshold determination that there is a plausible claim of illegality is often a significant factor in the standing analysis, simply because it is more "objectively" reasonable (under *Laird*) to fear injury from criminally lawless government action. *See* text accompanying note 44, *supra* (citing cases).

[55] In *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), the Sixth Circuit panel failed to produce a single opinion from the two judges in the majority, but their separate opinions both relied on *UPC* in concluding that actual surveillance was required to ground standing in chilling effect cases. *Cf. Amnesty*, 638 F.3d at 147 n.30, 149 (finding *ACLU* and *UPC* unconvincing).

fairly traceable to the NSA Program,[56] nor redressable by the relief requested, because Plaintiffs' communications could be subject to government surveillance by other means, including by warrants issued under Title III or FISA. In fact, the threat posed to attorneys by unchecked and unsupervised warrantless monitoring is vastly more grave than the threat posed by judicially regulated monitoring.

The Program introduces a threat to Plaintiffs' privileged communications that is different both in degree and in kind from the threat presented by lawful surveillance. First, conversations would be subject to FISA or Title III surveillance *only* if the government could produce the requisite probable cause before a court. While the government *claims* several CCR clients are al Qaeda members, the executive does not reach the statutory or constitutional threshold for lawful surveillance by simply claiming someone is a member of al Qaeda. It must adduce evidence before a court to do so.[57] More significantly, under the former regime attorneys could trust (and assure their clients) that their privileged communications would remain confidential because any information intercepted under the standard lawful procedures was subject to judicially-supervised minimization requirements

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[56] *Cf. Amnesty*, 638 F.3d at 133-34 ("standing … defeated only if … the injury is so completely due to the plaintiff's own fault as to break the causal chain" (quoting Wright & Miller treatise)).

[57] And that, remarkably, is what it has failed to do in a large number of our clients' cases (asserting state secrets privilege in Arar's case, for instance). Plaintiffs believe that the government held this position precisely because it could not produce such evidence.

designed to protect privileged information.[58] *See* 50 U.S.C. § 1806(a) (stating that "[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character"); *id*. § 1801(h) (defining required "minimization" procedures); 18 U.S.C. § 2518(5) (equivalent for Title III). These statutory minimization provisions institute the constitutional particularity requirement for wiretapping warrants.[59]

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[58] *Cf. ACLU v. NSA*, 493 F.3d 644, 704 (6th Cir. 2007) (Gilman, J., dissenting) ("If the TSP did not exist, the attorney-plaintiffs would be protected by FISA's minimization procedures and would have no reason to cease telephone or email communications with their international clients and contacts.").

[59] *See United States v. Daly,* 535 F.2d 434, 440 (8th Cir. 1976) (Title III minimization provision "was passed by Congress in order to comply with the constitutional mandate … that wiretapping must be conducted with particularity."); *see also United States v. Scott*, 436 U.S. 128, 135-39 (1978) (conflating Fourth Amendment and statutory standards for minimization); *Berger v. New York*, 388 U.S. 41, 57-60, 63-64 (1967) (first suggesting such a constitutional requirement to minimize scope of wire intercepts). The government has conceded before the Foreign Intelligence Surveillance Court of Review that courts have constitutionalized the minimization requirement. *See* Supplemental Brief of the United States, Appendix A: Comparison of FISA and Title III, *In re Sealed Case*, No. 02-001 (FIS Ct. of Review filed Sep. 25, 2002) at 1 n.1.

Courts have interpreted minimization requirements to include, at a minimum, a duty to institute procedures to protect the confidentiality of privileged communications. *See, e.g*., *United States v. Chavez*, 533 F.2d 491, 494 (9th Cir. 1976) (approving minimization limited to attorney-client and priest-penitent calls); *United States v. Turner*, 528 F.2d 143, 157 (9th Cir. 1975) (approving minimization, even in light of broad scope of monitoring, where privileged calls were excluded); *Kilgore v. Mitchell*, 623 F.2d 631, 635 (9th Cir. 1980) (noting that even prior to *Scott*, DOJ Title III policy mandated minimization of privileged calls); *United States v. Rizzo*, 491 F.2d 215, 217 (2d Cir. 1974) (minimization requirement met where officers instructed not to—and did not—monitor, record or spot-check privileged conversations).

The minimization and judicial oversight requirements mandated where the government seeks to carry out wiretapping under FISA and Title III are mutually reinforcing and serve to protect the confidentiality of privileged communications. Both features are absent from the warrantless surveillance carried out under the NSA Program. Indeed, the government has admitted that, "[a]lthough the program does not specifically target the communications of attorneys or physicians, calls involving such persons would not be categorically excluded from interception." Responses to Joint Questions from House Judiciary Committee Minority Members (Mar. 24, 2006) at 15, ¶45, *available at* http://judiciary.house.gov/media/pdfs/responses032406.pdf.

The fact that the relief Plaintiffs seek cannot *guarantee* the confidentiality of their past and present communications does not negate the fact that such an order would provide substantial relief. As the Supreme Court has explained, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in original); *see also Keene*, 481 U.S. at 476 (finding standing where requested injunction "would at least partially redress" plaintiff's injury); *Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007) (same). The relief Plaintiffs seek would eliminate their well-founded fear of *unlawful* surveillance (and retention of

records therefrom), and subject them only to the much less substantial threat that they might be subjected to lawful, regulated surveillance by our government, protected by judicial oversight and statutory minimization requirements. To suggest that that is not a redressable injury is to suggest that FISA serves no purpose in protecting privacy.

Plaintiffs' proposed relief would redress their injuries

The final shape taken by relief on the merits is, in the first instance, a question for the district court. At this stage we merely note that some relief capable of redressing Plaintiffs' injuries is available.[60]

On remand the district court could order expungement by demanding that Defendants destroy[61] any records that were acquired through the warrantless sur-

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[60] Plaintiffs need merely to show that relief on their claims would remedy the injuries they assert. That is true here: Presumably, *any* of the four causes of action pled by Plaintiffs—claims based on APA § 702 (for violation of FISA), Separation of Powers, the Fourth and First Amendments—could, if won on the merits, result in and be partially redressed by each of the remedies sought: disclosure, destruction, and an injunction against future surveillance.

The district court purported to analyze standing claim-by-claim, but it announced the same rule for measuring injury-in-fact in all cases involving chilling effect from surveillance, then dismissed each claim individually for failing to meet that "actual surveillance" test. ER-27-30. In *Amnesty v. Clapper*, plaintiffs pled four causes of action, under the Fourth Amendment, First Amendment, Article III and Separation of Powers. However, they had one fundamental injury common to all claims—harm flowing from the threat posed by unconstitutional surveillance—and relief on *any* of their four legal claims would have redressed it. The Court of Appeals analyzed their claims together. *See, e.g.*, 638 F.3d at 143 n.26. The same approach applies here.

veillance program that is the subject of this action, or were the fruit of such surveillance, and certify to the court *in camera* that it has done so. Such an order would not create any risk of making public the fact *vel non* of surveillance. *If such records exist*, they would be destroyed (or quarantined) under such an order; if they do not, nothing would occur. Either way, the certification to the Court would indicate simply that the government had complied with the Court's order; the Court could inform the parties that its order had been complied with,[62] and Plaintiffs would receive substantial redress for their injuries as a result.[63]

As Defendants conceded below,[64] federal courts have inherent Article III powers to order expungement. That is especially so where the remedy of expungement is essential to prevent corruption of the litigation process and the attendant undermining of the separation of powers.[65] "Federal courts have the equitable

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[61] Plaintiffs' proposed order contemplates first quarantining any surveillance materials that exist while *in camera* disclosure is worked through, "pending further order from this Court regarding the destruction or permanent quarantining of those materials." *See* Proposed Order, ER-33, at ¶ (2).

[62] *Cf.* Renewed SJ Br. (Dkt. 47), at 23-24 (describing government compliance with court orders in *Turkmen v. Ashcroft*, 2006 U.S. Dist. LEXIS 95913 at *8-*14 (E.D.N.Y. Oct. 3, 2006)).

[63] *Cf. Sullivan v. Murphy*, 478 F.2d 938, 973 (D.C. Cir. 1973), *cert. denied,* 414 U.S. 880 quarantine "under seal" may be remedy sufficient for "protection of plaintiffs' rights."); *Church of Scientology v. United States*, 506 U.S. 9, 13 n.6 (1992).

[64] Defs. Renewed MTD (Dkt. 39) at 21-23.

[65] *Cf. Sullivan*, 478 F.2d at 968 (regarding protester arrests); *Menard v. Saxbe*, 498 F.2d 1017, 1023 n.13 (D.C. Cir. 1974) (maintaining records of politically-motivated arrests risks undermining political process).

power 'to order the expungement of Government records where necessary to vindicate rights secured by the Constitution or by statute,'" *Norman-Bloodsaw v. Lawrence Berkeley Lab*., 135 F.3d 1260, 1275 (9th Cir. 1998) (quoting *Chastain v. Kelley*, 510 F.2d 1232, 1235 (D.C. Cir. 1975)).[66] "Expungement, no less than any other equitable remedy, is one over which the trial judge exercises considerable discretion. It is a versatile tool: expungement of only some records, from some Government files, may be enough, as may the placing of restrictions on how the information contained in the records may be used." *Chastain*, 510 F.2d at 1236; *see also Peters v. Hobby*, 349 U.S. 331, 349 (1955) (affirming expungement of disloyalty finding originating from what concurrence called "a broad, far-reaching espionage program," *id*. at 350 (Black, J., concurring)). It would surely be available as a remedy for any of Plaintiffs' four related causes of action.

As to remedial disclosure, Plaintiffs' first proposal was simply that the records be disclosed to the district court, which could then review the materials either *ex parte in camera*, or, at its discretion, with the assistance of security cleared counsel for Plaintiffs (such as the undersigned, who holds a TOP SECRET//SCI clearance). A variety of steps might follow, incrementally, in the court's remedial dis-

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[66] "It is equally well-established that expungement of records is, in proper circumstances, a proper remedy in an action brought directly under the Constitution," *Hobson v. Wilson*, 737 F.2d 1, 65 (D.C. Cir. 1984), "regardless of whether or not the plaintiff may also have a *Bivens* action for damages." *Reuber v. United States*, 750 F.2d 1039, 1061 (D.C. Cir. 1984).

cretion. *See* Renewed SJ Br. (Dkt. 47) at 21-25; Reply (Dkt. 50) at 4-5. *Public* disclosure might not be among them.

Finally, Plaintiffs' request for injunctive relief against further operation of the program is not moot.[67] The facts make it painfully obvious that the Program was halted to preempt review of its legality in the Sixth Circuit in the parallel *ACLU v. NSA*[68] litigation. *See supra* pp. 14-16. A party may not evade judicial review of questionable conduct by voluntarily ceasing such conduct during review. "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). To guard against intentional avoidance of judicial review, the party asserting mootness bears the "'heavy burden of persuading' the court" that "subsequent events [have] made it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *Id*. at 174, 189-90 (quoting *United*

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[67] The district court failed to address this relief in its opinion, despite the fact that Plaintiffs raised it in their renewed motion (*see* Dkt. 47 at 3), and that it was the central focus of their original 2006 summary judgment motion, Dkt. 16-3, which was never terminated by the district court (prior to its final judgment dismissing the case). *Cf*. Order, Dkt. 27 (Mar. 31, 2008) (terminating only Plaintiffs' Motion for Leave to File Supplemental Complaint, Dkt. 19 (challenging then-lapsed Protect America Act)).

[68] *See ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *rev'd*, 493 F.3d 644 (6th Cir. 2007) (dismissing for lack of standing), *cert. denied*, 552 U.S. 1179 (2008).

States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203 (1968)). The government cannot possibly meet this heavy burden, given its insistence at the time of cessation that the NSA Program had been (and remained) entirely legal, and its conspicuous failure to repudiate that position now.

CONCLUSION

For the reasons stated above, this Court should reverse the ruling of the district court and remand for further proceedings on the merits.

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[69] Counsel acknowledges the able research assistance of Julian Simcock, a law student, in preparing this brief.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 13,850 words, and was prepared in 14-point Times New Roman font using Microsoft Word 2003.

/s/
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CERTIFICATE OF RELATED CASES

Counsel are aware of the following cases arising out of the NSA Program and coordinated with the instant case as part of the multidistrict litigation in the district court: *Hepting v. AT&T Corp., et al.*, 9th Cir. No. 09-16676; *McMurray v. Verizon Communications, Inc., et al.*, 9th Cir. No. 09-17133; *Jewel v. NSA*, 9th Cir. No. 10-15616; *Shubert v. Obama*, 9th Cir. No. 10-15638; and *Al-Haramain Islamic Foundation, Inc. v. Obama*, 9th Cir. Nos. 11-15468, 11-15535.

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant The Center for Constitutional Rights has no parent corporation, and no publicly-owned corporation owns any of its stock.

/s/
Shayana D. Kadidal
Attorney for Plaintiff-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 29, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have served the foregoing document on counsel listed below by attaching the PDF file to an email sent to their respective addresses, below, with prior written consent from Defendants' counsel pursuant to FRAP 25(c)(1)(D):

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